

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,]
V.] CASE NO. CR-22-253-TFM
AYENI, BABATUNDE FRANCIS,]
DEFENDANT.]

DEFENDANT'S POSITION RELATIVE TO SENTENCING FACTORS

COMES NOW the defendant in the above styled cause, by and through his/her attorney of record, Tim W. Fleming, and hereby submits his/her Position Relative to Sentencing Factors, and in response thereto, states as follows:

FACTUAL OBJECTIONS:

1. Defendant's date of arrest in London, England was 05/31/23.
2. Defendant denies knowledge of the events presented in paragraph #10 and its subparts.
3. Defendant denies any participation in the loss (intended or actual) of the 231 victims alleged in paragraph # 11, and the \$19 million-dollar total loss figure stated therein (other than the events occurring in Gulf Shores, AL involving the sum of \$42,777.29). Said loss amount was a result of other/separate conspiracies on the part of the codefendants. They were not participated in nor reasonably foreseen by Ayeni. This is consistent with the terms and definitions set forth in USSG §2B1.1, App Note 3, as set forth below:

...
3. Loss Under Subsection (b)(1).—*This application note applies to the determination of loss under subsection (b)(1).*

(A) General Rule.—*Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.*

(i) Actual Loss.—*“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.*

(ii) **Intended Loss.**—“**Intended loss**” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) **Pecuniary Harm.**—“**Pecuniary harm**” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, “**reasonably foreseeable pecuniary harm**” means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.”

CALCULATION OBJECTIONS:

1. Defendant objects to paragraph 21 and submits that the loss should be determined as the amount of restitution the defendant is held accountable to as shown in the Court’s Order and Forfeiture Money Judgment (doc # 68). Any dollar amount more than this sum was not foreseeable by the defendant and was not contemplated during the time of defendant’s acts and appears likely to be the continued acts of the alleged co-defendants Ogunsanwo and Lasisi who remain abroad in foreign countries. “Loss” should be calculated based on defendant’s intended and actual loss (\$42,777.29), and thus result in a 6-level increase rather than a 20-level increase. (USSG § 2B1.1(b)(1)(D)).
2. Defendant objects to paragraph # 22 and submits that his actions involved 1 victim and that was the total number of his intended victims.
3. Defendant agrees with paragraph 23.
4. Paragraph 24 should thus be a total base offense level of 15 rather than 31.
5. Paragraph 32 Total Offense Level should thus be 11.
6. Paragraph 57 should thus reflect a sentencing range of 8-14 months.

CREDIT FOR TIME SERVED

Defendant has been incarcerated on these charges since his arrest in London, England on 05/31/23. As of the sentencing date scheduled for 08/15/24, the defendant shall have served 442 days and is entitled to credit for the same.

CERTIFICATE OF CONSULTATION

I do hereby certify that I have consulted with the prosecuting U.S. Attorney, the Honorable Christopher Bodnar and U.S. Probation Officer V. Grace Killcreas regarding the defendant's position relative to sentencing factors.

Done this August 1, 2024.

Respectfully Submitted,

/s/ Tim W. Fleming

TIM W. FLEMING, ESQ. (flemt2847)

THE FLEMING LAW FIRM, LLC

Attorney For Defendant

Physical: 3929 Airport Blvd, Suite 2-300
Mobile, AL 36609

Mail: 6845 U.S. Hwy 90 E, Ste 105, PMB 300
Daphne, AL 36526
(251) 304-0888 (w)
(251) 304-0880 (fax)
tim@timfleminglaw.com

CERTIFICATE OF SERVICE

I, the undersigned do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: The Honorable Christopher Bodnar, Esq., U.S. Attorney's Office, 64 S. Royal Street, Suite 600, Mobile, AL 36602.

Done this August 1, 2024.

/s/ Tim W. Fleming

TIM W. FLEMING